No. 20,807

IN THE

United States Court of Appeals

For the Ninth Circuit

LESLY COHEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR REHEARING

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To the Honorable Chief Justice, and to the Honorable Associate Justices of the United States Court of Appeals:

Appellant respectfully petitions this Honorable Court for a rehearing on the followinng two grounds:

I

THE MOTION TO SUPPRESS

Since the decision in this case the Supreme Court of the United States has had occasion to rule in a situation where the government has filed affidavits denying misconduct in connection with eavesdropping, *Hoffa v. U. S.,* No. 1003 denied May 27, 1967. In this case the Solicitor General informed the Supreme

Court that information secured as a result of wiretapping was neither used at the trial nor were investigative leads secured therefrom. The Supreme Court in rejecting the argument that such a statement in the absence of detailed evidentiary affidavits on the part of the petitioner foreclosed an evidentiary hearing stated as follows:

> "We consider it more appropriate that each of these petitioners be provided an opportunity *to establish,* if he can, that the interception of this particular conversation or other conversations initiated in some manner his conviction." (Emphasis added.)

In the instant case the opportunity to take deposition was denied by Judge Carter. The government however in its affidavit admits tampering with appellant's mail but denies any misconduct just as in *Hoffa* the government admitted an interception of a conversation but denied misconduct with respect to the case itself.

In view of the *Hoffa* decision we think the Court should reconsider its decision that setting forth misconduct in terms of the statute is insufficient and that without an affidavit from the government itself admitting misconduct a defendant is not entitled to an evidentiary hearing on mail tampering or wiretapping. The only opportunity for appellant to examine the witnesses who really knew the facts surrounding the wiretapping and the mail watch would have been at such a hearing; such an opportunity was denied and we believe so also was a fair trial.

II

SCHUMAN'S IMMUNITY REQUEST

This Court properly recognizes that counsel's cross-examination of the crucial witness, Schuman, was improperly limited. The Court however rejects the argument that this error should cause reversal on the basis that the jury was allowed access to the impeaching testimony by way of stipulation with the Government. See page 11 Opinion.

We respectfully point out to the Court that this assumption on the part of the Court is unfounded and incorrect. When Schuman at page 272 of the Transcript was questioned concerning a request for immunity, he denied any such request was made by him. Counsel then stated to the Court at page 273:

> "For the purpose of the record your Honor I would like to read to the reporter in the *absence of the jury* . . . the question that I was going to ask here." (Emphasis added.)

After re-examination by the Government of the witness Schuman the Court ordered a recess, TR 278. Since both the Court of Appeals and the Government indicate that this matter was discussed in the presence of the jury we will set forth in haec verba the transcript from this point on:

> "Ladies and gentlemen, we will take a few minutes recess at this time. Would you step out?
>
> (Jury retires from the courtroom.)
>
> The Court: Now, Mr. Foster, you desire to have the statement—you better identify it by Exhibit number and so forth, if it hasn't been already identified.

Mr. Foster: I am reading from Exhibit No. 16 of the Government and I am reading actually the last sentence of the statement.

The Court: Yes.

Mr. Foster: The question I desired to ask Mr. Schuman was as follows:

'*Both Mr. Schuman* and his attorney assured me that given the proper immunity any information which they might have relating to our inquiry would be given, completely and truthfully.' (Emphasis added.)

The Court: Go ahead.

Mr. Foster: I intended to ask the witness whether or not that statement was made by him in the manner summarized by the agent.

The Court: The record will show what the situation was, it is in the record. . . .

The Court: The record is made and the record is there and the ruling stands.

Mr. Foster: Thank you.

The Court: No change in the record at all. (Short recess.)"

The jury was not present when the statement of Mr. Schuman was identified for the record. The jury did not have the opportunity of knowing that Mr. Schuman had lied under oath concerning a request for immunity in connection with the prosecution of appellant. In view of the equivocal nature of Mr. Schuman's testimony this impeaching evidence was vital on the question of his credibility and memory. If there was a reasonable doubt as to the accuracy of Mr. Schuman's memory at the time of his placing the call, appellant should have been acquitted. This

crucial lapse of memory or deliberate lie on the part of Schuman should have been before the jury and its lack deprived the defendant of a fair trial.

Dated, San Francisco, California,
May 31, 1967.

JOHN V. LEWIS,
RICHARD H. FOSTER,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL

We hereby certify that in our judgment this petition for rehearing is well founded and is not interposed for delay.

Dated, San Francisco, California,
May 31, 1967.

JOHN V. LEWIS,
RICHARD H. FOSTER,
Attorneys for Appellant and Petitioner.